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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 25

FREDERICK T. ZUBER, ET AL., PETITIONERS

v.

RUSSELL ALLEN, ET AL.

No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, PETITIONER

v.

RUSSELL ALLEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE

OPINIONS BELOW

The opinion of the court of appeals (A. 187–215) is reported at 402 F.2d 660. The findings and conclusions of the district court and its order granting summary judgment (A. 120–129) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968 (A. 216). By order of Decem-

ber 14, 1968, Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including February 20, 1969. The petition was filed on that date, and was granted on April 7, 1969 (A. 222A; 394 U.S. 958). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture has authority, under § 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(5)(B)(ii), to include in a Federal Milk Marketing Order a provision for a farm location differential based on the distance of the producer's farm from the center of the market.

STATUTE AND REGULATION INVOLVED

Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. IV) 608c(5), provides in pertinent part:

> Milk and its products; terms and conditions or orders:
>
> (5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk

purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the ap-approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials

customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year.

The Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001, provides in pertinent part:

§ 1001.72 Farm location differentials:

[*In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.*]

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60, 1001.62, and 1001.63 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield.

MAINE

The towns of:

Eliot.
Kittery.

MASSACHUSETTS

All counties other than Berkshire County.

NEW HAMPSHIRE

Rockingham County, and the following cities and towns:

Allenstown.
Amherst.
Barrington.
Bedford.
Bow.
Brookline.
Chichester.
Deering.
Dover.
Durham.
Epsom.
Francestown.
Goffstown.
Greenfield.
Greenville.
Hinsdale.
Hollis.
Hooksett.
Hudson.
Lee.
Litchfield.
Lyndeborough.
Madbury.
Manchester.
Mason.
Merrimack.
Milford.
Mount Vernon.
Nashua.
New Boston.
New Ipswitch.
Pelham.
Pembroke.
Pittsfield.
Rochester.
Rollinsford.
Strafford.
Temple.
Weare.
Wilton.
Winchester.

RHODE ISLAND

All of the State of Rhode Island.

VERMONT

The towns of:

Guilford.	Vernon.
Halifax.	Whittingham.
Readsboro.	

(b) With respect to milk received from a producer whose farm is located within any of the following cities and towns, the differential shall be 23 cents per hundredweight, unless the addition of 23 cents gives a result greater than the Class I price determined under §§ 1001.60, 1001.62, and 1001.63 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

MAINE

Berwick.	North Berwick.
Kennebunk.	Sanford.
Kennebunkport.	South Berwick.
Lebanon.	Wells.
Lyman.	York.

MASSACHUSETTS

Becket.	Sandisfield.
Florida.	Savoy.
Hinsdale.	Washington.
Otis.	Windsor.
Peru.	

NEW HAMPSHIRE

Antrim.
Barnstead.
Bennington.
Boscawen.
Bradford.
Canterbury.
Chesterfield.
Concord.
Dublin.
Dunbarton.
Farmington.
Fitzwilliam.
Gilmanton.
Gilsum.
Hancock.
Harrisville.
Henniker.
Hillsborough.
Hopkinton.
Jaffrey.
Keene.
Loudon.
Marlborough.
Middleton.
Milton.
Nelson.
Northfield.
Peterborough.
Richmond.
Rindge.
Roxbury.
Sharon.
Somersworth.
Stoddard.
Sullivan.
Surry.
Swanzey.
Troy.
Webster.
Westmoreland.
Windsor.

VERMONT

Brattleboro.
Brookline.
Dover.
Dummerston.
Marlboro.
Newfane.
Putney.
Wilmington.

STATEMENT

Respondents are Vermont dairy farmers selling milk in the Massachusetts-Rhode Island market. They seek to enjoin the operation of the "farm location differential" provision of the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001.72.

The Order provides in general for the computation of a uniform "blended" price to be paid to all farmers marketing milk under the Order; it also provides for specified differential payments to be made, over and above the blended price, to particular farmers. Under the farm location differential, such additional payments are to be made for all milk from farms located near the centers of the market. Respondents' farms are located too far from the market centers to qualify for this payment.

The farm location differential is the direct successor of a similar differential which took effect, as part of the Boston Milk Marketing Order, on February 9, 1936.[1] For years prior to federal regulation of the marketing of milk in the Boston area, farms near

[1] The 1936 Order provided as follows (A. 230–231):

"ARTICLE VIII—PAYMENTS FOR MILK

"SECTION 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period, each handler shall make payments, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

"1. To producers, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in paragraphs 1 and 2 of section 4 of this article, for that quantity of milk delivered by each producer not in excess of the base of such producer;

"2. To any producer, whose farm is located within forty (40) miles of the State House in Boston and who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer; * * *"

Boston had received higher prices for their milk than more distant farms. From 1923–1932, the differential "nearby" farms thus experienced averaged in excess of $1.00 per hundredweight of milk (A. 277–278, 283–285). Part of this amount represented lower transportation and handling costs for the nearby farms; but approximately 46 cents of the difference represented a premium in excess of that difference in cost (A. 526, 566; 32 Fed. Reg. 9919). This premium was voluntarily paid by milk processors who had contracts with certain cooperatives from the middle 1920's until the advent of federal licensing in 1933.[2]

This premium reflects the fact that milk for drinking has always been able to command a higher price than milk for manufacturing purposes (ice cream, butter, powdered milk, etc.),[3] and that historically

[2] A detailed historical description of the relevant practices and Federal regulations is found in *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y.), appeals pending, C.A. 2, Nos. 32793–32796; and see 32 Fed. Reg. 9919.

[3] The market for milk for manufacturing purposes is much more subject to competition from low cost sources of supply than that from fluid milk. This results from the high perishability of milk in fluid form, the cyclical nature of milk production, and the relatively constant demand for fluid milk. That is, fluid milk must be consumed within a few days of its production; this limits both the time and space within which it can be used for this purpose. Once milk is manufactured into butter, cheese, or other products, however, it has a much longer useful life. Moreover, cows produce considerably more milk in the spring and summer, the flush season, than in fall and winter; the maintenance of herds sufficient to supply winter drinking needs means that there will be substantial surpluses available for manufacturing during the flush season. Summer fluid milk cannot compete with winter fluid milk; summer, low-cost area manufactured products can always be brought into the com-

nearby farmers have sold a higher proportion of their milk for the former purpose, at a higher price, than have more distant farmers. As this Court has set out elsewhere,[4] regulation of the dairy industry became necessary when competition for the more lucrative fluid market threatened severe dislocations of the industry and, correspondingly, of the supply. While federal regulation sought to control that competition, it did not interfere with the relative positions of nearby and distant producers. Thus, in 1933, a federal license adopted for the Boston area under the Agricultural Adjustment Act ("AAA") preserved the premium nearby farmers had been receiving by giving farmers within a specified distance of Boston a higher base for their milk (A. 38, 39). Since the base determined what proportion of their milk was deemed to have been sold at Class I (fluid milk) prices, they received a higher price for any given quantity of milk than more distant farmers would. In May of 1935, the Boston license was declared invalid for reasons unrelated to this arrangement. *United States* v. *Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass.).

The Agricultural Adjustment Act was amended in 1935, in part to avoid excessive delegation of authority such as this Court had found objectionable in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295

petition for a particular market. Thus, the price in that market for milk designated for manufacturing uses will be lower than that for fluid milk, even though it is of the same quality.

[4] *Nebbia* v. *New York*, 291 U.S. 502, 516–518; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 548–550, 570.

U.S. 495. The Committee Reports recommending passage of the amendments state that the provisions dealing with the marketing and distribution of milk and its products (Section 8c(5)) "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present Section 8(3) of the Agricultural Adjustment Act." H. Rep. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. 1011, 74th Cong., 1st Sess. (1935), p. 9. The amended Section 8c(5) is in all relevant respects the same as 7 U.S.C. (Supp. IV) 608c(5), the statutory provision whose meaning is at issue in this case.

The Boston Milk Marketing Order, which went into effect February 9, 1936, was one of the first Milk Marketing Orders issued under the amended statute. It essentially preserved to any producer "whose farm is located within forty (40) miles of the State House in Boston" (A. 231),[5] the premium which had existed under the federal license. The Secretary found that "the payment of Class I [fluid] prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for Class I use" (A. 224).

The Boston Order remained in effect only until August 1, 1936, when the District Court for the District of Massachusetts ruled the amended AAA

[5] See n. 1, *supra*, The Boston Order was then known as "Order No. 4."

unconstitutional. *United States* v. *David Buttrick Co.*, 15 F. Supp. 655, reversed, 91 F. 2d 66 (C.A. 1), certiorari denied, 302 U.S. 737. The Secretary suspended the Boston Order at that time, and it remained suspended until after the passage of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601.[6]

That Act essentially reenacted the marketing order provisions of the AAA, with minor amendments not touching Section 8c(5). This was done to avoid district court decisions, such as *Buttrick, supra,* which had held that the processing tax provisions of the 1935 Act held invalid in *United States* v. *Butler,* 297 U.S. 1, were not severable, and that the whole of the AAA was therefore invalid. H. Rep. 468, 75th Cong., 1st Sess. (1937), p. 2. Section 4 of the 1937 Act, 50 Stat. 249, 7 U.S.C. 672(a), further provided that all existing marketing Orders and their provisions were "expressly ratified, legalized, and confirmed."

The Boston Order was reinstated, with some changes, on August 1, 1937. It again contained a differential based on farm location (2 Fed. Reg. 1331, 1333):

> Section 4. Location differentials:
>
> * * * * *
>
> 3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

[6] See *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, 592.

> 4. With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

This order soon became the subject of extensive litigation, in which both the constitutionality of the Agricultural Marketing Agreement Act and the validity of various provisions of the Order—including the nearby differential—were attacked. Parallel litigation was brought in New York, attacking the Act and various provisions of the New York Order, including a nearby differential which in that case required handlers to pay producers in 18 counties near New York City $.20 per hundredweight above the uniform or "blend" price.

These cases reached this Court in early 1939. In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, it upheld the constitutionality of the Act. *Rock Royal* also held that the New York nearby differential was authorized by Section 8c(5)(A) of the Act, 307 U.S. at 567, over objections by Rock Royal Co-operative that it violated the uniformity provisions of that section of the Act. The attack on the Boston farm location differential was not presented to this Court in *Hood*, but remained in the lower courts for disposition. In December 1939, the Court of Appeals for the First Circuit approved its inclusion in the Boston

Order. *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342, 346.

The Secretary subsequently extended regulation of milk marketing to subsidiary markets in New England, issuing Marketing Orders for the Springfield and Worcester, Massachusetts, areas (14 Fed. Reg. 7085, 7097, Nov. 23, 1949), and for southeastern New England (consisting of Rhode Island and portions of southeastern Massachusetts) (23 Fed. Reg. 8225, Oct. 24, 1958). Each of these orders contained a farm location differential in substantially the same form as the Boston Order.

These orders were consolidated with the Boston Order to form the present Massachusetts-Rhode Island Order in August 1964. 29 Fed. Reg. 11205. When this consolidation was proposed, certain cooperatives whose members were non-nearby producers sought to have the farm location differential deleted from the Order. Groups representing nearby producers, on the other hand, asked that the amount of the differential be increased (A. 474–475). Both proposals were rejected. The Secretary's decision stated:

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption cen-

> ters as compared to the market value of milk produced in the more distant areas of the milkshed. [29 Fed. Reg. 11213].

He also found that no showing had been made that these long-standing provisions created unstable marketing conditions (*ibid.*), and that an increase was unwarranted because "the intrinsic value of the [nearby] milk has not been increased" (29 Fed. Reg. 11214). The Secretary's opinion added (*ibid.*):

> As indicated above, we believe there are adequate reasons on this record for continuing the farm location differentials at their present rates. An industry study may be made, of course, at any time or could have been made at any time in the past in preparation for their review. The matter may be reviewed when it is shown that further consideration in hearing is appropriate. We are not warranted in deferring the decision until such a study has been made.

The proposed order consolidating the prior orders, and retaining the farm location differential, was approved by a vote of 89.3 percent of the producers who participated in the referendum, see 29 Fed. Reg. 12237. Two thirds of the eligible farmers reside outside the areas for which the differential is payable (A. 55).[7]

[7] In 1966, various groups proposed amendments to the Massachusetts-Rhode Island Order, including one for the deletion of the farm location differential. 32 Fed. Reg. 9902. Hearings had been held, and these proposals were pending before the Secretary, when the present suit was brought. On July 6, 1967, subsequent to entry of judgment by the district court, the Secretary issued a recommended decision on all proposals. While noting

This action was filed on December 27, 1966, shortly after the United States Court of Appeals for the District of Columbia Circuit had decided in *Blair* v. *Freeman,* 370 F. 2d 229, that a nearby differential provision in the New York-New Jersey Milk Marketing Order was invalid. On January 16, 1967, the district court entered a preliminary injunction against enforcement of the differential and required the Secretary to place future farm location differential payments under the Order into an escrow fund.[8]

The Secretary's subsequent motion to hold the proceedings in abeyance for the pending administrative proceedings, n. 7 *supra,* was denied (A. 107), and respondents moved for summary judgment, which the Secretary opposed (A. 112–115). On May 24, 1967, the district court entered the following order (A. 120):

> The plaintiff's motion for summary judgment is granted on the authority of *Blair et al.* v. *Freeman,* U.S. App. D.C. , No. 19,801, decided November 18,1961.

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the instant litigation and stating that the judicial decision would not in any way be circumvented (32 Fed. Reg. 9920), he discussed the proposal to delete the differential and concluded that "The farm location differential * * * should be continued" (32 Fed. Reg. 9918). He reaffirmed that the differential had been promulgated on a record showing more even seasonal production and ready accessibility of nearby producers' milk (32 Fed. Reg. 9919), and added that he considered the differentials to have been "market differentials customarily applied by the handlers," based on the evidence of pricing of milk prior to regulation (*ibid.*).

[8] The district court denied a motion of petitioners *Zuber, et al.*, in No. 25, to intervene. The court of appeals later permitted them to intervene at the appellate level, for purposes of prosecuting an appeal. See *Zuber* v. *Allen*, 387 F. 2d 862.

Counsel for plaintiffs will submit an appropriate order.

Plaintiffs' counsel submitted lengthy "findings of fact" and "conclusions of law," which the court signed *verbatim.* Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656–657. It then entered judgment permanently enjoining the Secretary and his agents from enforcing the farm location differential.

The Secretary and the intervenors Zuber, *et al.*, appealed. On September 23, 1968, the court of appeals entered an opinion affirming the judgment of the district court on the authority of its *Blair* decision (A. 187–215; 402 F. 2d 660). It gave the district court's action effect from the date of entry of the permanent injunction by ordering that escrowed differential payments relating to the period before that date be paid out to the nearby farmers but that the distant farmers were entitled to share the amounts collected thereafter.[9]

SUMMARY OF ARGUMENT

The principal question presented is whether the Secretary of Agriculture has authority under the Agricultural Marketing Agreement Act of 1937 to provide in federal milk marketing orders that dairy farmers located near market centers shall receive a special differential, in addition to the generally prevailing price in the market, on account of that fact.

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[9] Respondents, by petition for a writ of certiorari in No. 26, O.T. 1969, assert their right to share the earlier payments as well; but this Court has not acted on the petition, and that issue therefor is not involved in the present proceedings.

Subsidiary questions are whether that differential prohibits the marketing in that area from other areas of the United States, in violation of Section 8c(5)(G) of the Act; and whether there was a substantial basis for the Secretary's determination that the continued use of such a differential was warranted in the Massachusetts-Rhode Island market. We deal with each in turn.

The question of statutory authority turns upon the meaning of two phrases in Section 8c(5)(B) of the Act. One, in describing the marketwide pooling type of regulation involved in this case, states that a milk marketing order establishing this type of pool must provide that all producers in the market shall receive "uniform prices for all milk * * * irrespective of the uses made of such milk by the individual handler to whom it is delivered." The other phrase modifies the provision for uniform prices by permitting adjustments, *inter alia,* for "market * * * differentials customarily applied" by milk handlers. Prior to the legislation, there was often destructive competition among producers to sell to handlers for the higher priced fluid (Class I) uses; one of the purposes of the statute was to permit the Secretary to curb such competition. The court of appeals concluded that the "irrespective of the uses" phrase was intended to accomplish this effect by forbidding the Secretary from adopting any adjustment to price which reflected or relied upon patterns of use, and that the farm location differential, which is related to the higher value of nearby farmers' milk for fluid uses, was such an adjustment and therefore forbidden. Without resort to

other legislative history, it limited the phrase "market differential" to a meaning appearing in Committee Reports at the time of its adoption—thus excluding the farm location differential from qualifying under that phrase—and found that the present farm location differential had not been customarily applied prior to 1937, when its immediate predecessor was promulgated.

A.

The differential nearby farmers received for their milk was well established in the Boston market long before the advent of federal regulation, and was recognized by the dairymen's cooperatives that attempted to impose self-regulation on that market in the late '20's and early '30's. Federal regulation began in 1933, with the Agricultural Adjustment Act; the licenses issued under that Act for the Boston milk market also recognized and paid a differential to nearby farmers. Then, as previously in the free market, those farmers received approximately $.46/hundredweight of milk in excess of differences attributable to transportation and handling cost differences. The statutory provisions at issue in this case were adopted as amendments to that Act in 1935, chiefly to avoid any appearance of unconstitutional delegation; in general, moreover, Congress' purpose was to "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to [that Act] * * *" H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. No. 1011, 74th Cong., 1st

Sess. (1935), p. 9. There is no indication that Congress meant radically to revise the regulatory structure of the market from what existed before; elimination of the pricing differential nearby farmers had enjoyed, and substitution of a rigid notion of price equality such as the court below found required, would have constituted such a revision.

When the 1935 amendments were enacted, the Secretary immediately promulgated an Order for the Boston market, which again provided a differential for nearby farmers. Any question as to his authority to do so was settled in 1937, when the Congress again reenacted the agricultural regulatory legislation, as the Agricultural Marketing Agreement Act of 1937; the new statute expressly provided that orders adopted under the prior legislation "are hereby expressly ratified, legalized, and confirmed," 7 U.S.C. 672(a), and its legislative history makes clear that this provision was affirmatively intended to settle any doubts that might have existed concerning the Secretary's authority for his actions under the prior statutes. Again, a revised Boston order was immediately promulgated, and it again contained a differential in addition to transportation and handling advantages of $.46/hundredweight for nearby farmers—this time, substantially in the present form. That differential and a similar provision of the New York milk marketing order were then challenged in court and upheld, despite arguments similar to those adopted by the court below. *Green Valley Creamery, Inc.* v. *United States,* 108 F. 2d 342, 346 (C.A. 1); *United States* v. *Rock Royal Co-operative,* 307 U.S. 533, 567.

B.

Having shown the history of use, recognition, and confirmation of a farm location differential in the Boston market, we then examine the statute more closely, to determine whether it nevertheless requires the conclusion reached below, that a price differential based upon the patterns of use and prices enjoyed by particular groups of farmers is forbidden. When the marketwide pooling technique is considered in relation to the other techniques available to the Secretary, its distinctive feature is seen to be that producers selling under such a pool receive prices which do not vary with the uses to which the handler they sell to puts the milk. Thus, the natural meaning to be assigned to the statute's statement that the price producers receive under marketwide pooling shall be "irrespective of the uses made of such milk by the individual handler" is that it simply describes the special or unique effect of this type of regulation.

The farm location differential does not interfere with that effect. A nearby farmer receives it even if the milk he sells is used entirely for the lower priced manufacturing purposes, and a distant farmer will not receive it even if all his milk is in fact used for the higher priced fluid purposes. The question whether that differential is authorized must be resolved by reference to the permitted classes of adjustments, including "market * * * differentials customarily applied," not circularly by concentrating on the provision for uniform prices without consideration of the permitted adjustments. In any event, in maintaining

the differential the Secretary has relied on economic factors underlying the nearby farmer's traditional advantage in the market, rather than the fact of greater Class I use as such, so that even on the court's premise, its conclusion was wrong.

Turning to the question whether the farm location differential is a permitted "market differential" under the Act, we maintain, as the First Circuit decided in *Green Valley Creamery, supra,* shortly after passage of the Act, that those words should be given their natural import, as referring to any differential existing and customarily applied in the market—which the farm location differential plainly was. The court's contrary view was based on a narrow definition suggested in Committee Reports. But the overall legislative purpose, simply to reiterate former practices in detail sufficient to withstand a claim of unconstitutional delegation, is entirely consistent with the broader meaning. The narrower meaning was subsequently repudiated by the Floor Manager of the bill in the Senate and, if intended, would have signified a radical departure from prior forms of regulation, which the legislative history nowhere reflects. The Secretary and the courts, including this Court, have ascribed the broad meaning to the phrase. The narrower meaning described by the Committee Reports would deprive the phrase of operative meaning, since the differential described could also be justified under another adjustment provision.

Finally, we return to the question whether the farm location differential was one "customarily applied."

The court of appeals thought not because of changes in form which had marked the various milk marketing orders in which it was included. Those changes, however, were not of substance. The critical considerations are that dairy farmers in the Boston market have consistently received a differential of approximately $.46/hundredweight over and above transportation payments or allowances for delivery directly to city markets, and that this differential was attributable only to the factor of farm location. This was true before federal regulation, under the licenses, under the 1936 Boston order, and under the 1937 Boston order and its successors. The change in form in the 1937 order did not alter the continuity with which this differential has existed in the market.

C.

The use of the differential does not "prohibit" the flow of milk from other areas of the country, as is forbidden by Section 8c(5)(G) of the Act, 7 U.S.C. 608c(5)(G). About three fourths of the milk in the market is received from non-nearby sources, the bulk of it from Vermont; there is no evidence that use of the differential—which results in conditions approximating those that would obtain in a free market—has distorted production patterns. And the statute plainly contemplates numerous adjustments in price to producers which might have some effect on flow; Congress could not have intended such effects to constitute a forbidden prohibition, with the consequence that such adjustments could not be made. Finally, the only possible basis for arguing that the differential does "prohibit"

the flow of milk is a theory that, were it not paid, the prices to non-nearby farmers would be higher. Such an effect is entirely speculative, since surplus milk flowing from other areas might quickly restore the price at the edge of the milkshed to the equilibrium with prices in other areas it now enjoys.

II.

The Secretary had a substantial basis for his 1964 decision to continue, but not increase, the farm location differential in New England markets. In two sizeable markets, one unregulated and the other regulated in a manner which permits the price to producers to vary from handler to handler, nearby producers have enjoyed differentials of similar magnitude, as a result of free market forces. The long practice of using such differentials in New England has not proved disruptive; rather, there was evidence from which the Secretary could conclude that withdrawal of the differential would lead to disruption, by substantially weakening the dairy industry near urban centers.

ARGUMENT

I. THE TERMS, BACKGROUND AND HISTORY OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AND OF NEARBY DIFFERENTIAL PROVISIONS, SHOW THAT CONGRESS AUTHORIZED THE SECRETARY OF AGRICULTURE TO EMPLOY SUCH PROVISIONS IN FEDERAL MILK MARKETING ORDERS.

The principal question presented by this case is whether the Secretary of Agriculture has statutory authority to include differentials based upon farm

location in federal Milk Marketing Orders. That question depends upon the meaning of the following language of Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, 7 U.S.C. (Supp. IV) 608c(5):

In the case of milk and its products, orders * * * shall contain one or more of the following terms and conditions, and * * * no others:

* * * * *

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, *irrespective of the uses made of such milk by the individual handler to whom it is* delivered; subject * * * only to adjustments for (a) volume, market, and production differentials customarily applied by handlers subject to such order * * * [Emphasis supplied.]

The emphasized language constitutes the matter most immediately in dispute. The court of appeals understood the reference to "irrespective of the uses made" to mean that the Secretary was forbidden to employ any differential which in any way reflects the extent of Class I sales enjoyed by one group of farmers as compared to another, whatever its economic justification; in its view the statute was intended to provide a uniform price for all, irrespective either of historical price advantages nearby farmers may have enjoyed because a higher proportion of their milk was bought for fluid use, or of the economic reasons for those advantages. It therefore held that the farm location differential was not a "market differential" authorized

by the Act. On the other hand, since federal regulation of milk marketing began, the Secretary has consistently acted on the understanding that he is authorized to establish farm location differentials to reflect the higher prices that farmers located near the market traditionally have been able to obtain in marketing their milk. In his view, he is forbidden to consider only that use which milk delivered to a particular handler *actually* is put to, and is not required to abolish historic patterns of use in the market as a whole ("market differentials") reflecting its economic structure. Since the farmer receiving a farm location differential receives it "irrespective of the uses made of [his] milk by the individual handler" to whom he sells, and has customarily received it because of his role in the market, the statute is complied with.

The dispute between court and Secretary can be viewed in another way; the court appears to view these provisions as designed radically to alter the relationships of groups of producers in the market by imposing an equality of price which never previously existed; the Secretary views them as permitting him simply to stabilize the market, for the benefit of all producers, within the traditional pricing structure.

If the Secretary's less radical interpretation of the statutory language finds any support in the context and history of the Act, it is entitled to great weight.

> This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in mo-

tion, of making the parts work efficiently and smoothly while they are yet untried and new. *United States* v. *American Trucking Assns., Inc.,* 310 U.S. 534, 549; *Udall* v. *Tallman,* 380 U.S. 1, 16–18; *Red Lion Broadcasting Co.* v. *Federal Communications Comm'n,* No. 2, Oct. Term, 1968, decided June 9, 1969, 37 U.S.L.W. 4509, 4513. To show that it does, we begin by examining the history of milk marketing in the Boston market.

A. NEARBY FARMERS SELLING MILK IN THE BOSTON MARKET WERE ABLE TO COMMAND A PRICE DIFFERENTIAL BEFORE FEDERAL REGULATION AND, WITH LEGISLATIVE AND JUDICIAL APPROVAL, HAVE CONSISTENTLY RECEIVED THE SAME DIFFERENTIAL UNDER FEDERAL REGULATION SINCE IT BEGAN

1. The marketplace and federal regulation prior to the 1935 amendments to the Agricultural Adjustment Act awarded higher milk prices to farms near the Boston market

The situation as it existed prior to adoption of any federal regulation is clearly set out in the most recent decision of the Secretary discussing the farm location differential, 32 Fed. Reg. 9902, 9919; see also Record, *H. P. Hood & Sons, Inc.,* v. *United States,* 307 U.S. 588, October Term, 1938, No. 772, Vol. II, pp. 76–210; *Cranston* v. *Freeman,* 290 F. Supp. 785, 796–801 (N.D. N.Y.) appeals pending, C.A. 2, Nos. 32793–32796. During the years 1927–1930, producers marketing milk in Southboro, Mass. (a Boston suburb) received $1.16 per hundredweight more than producers selling to the Boston market from 191–200 miles distance; between 1923 and 1932, producers marketing in Bedford, another suburb, enjoyed a $1.04 advantage; and between 1920 and 1930, producers marketing in Salem received $1.20–$1.30 more than producers 191–200 miles away. Of these

sums, only about $.54 was attributable to lower costs of transportation and handling; the remainder was attributable to location. (A. 277–278, 283–285, 299, 320, 645–646.) And this economic advantage was not simply due to the fact that the nearby farmers marketed a greater percentage of their milk in fluid form, although that was true (A. 285–286); they "in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located." *Green Valley Creamery, Inc.*, v. *United States*, 108 F. 2d 342, 346 (C.A. 1). Contracts between cooperatives and handlers in the Boston market regularly provided for such differentials long before federal regulation began. *Cranston, supra*, 290 F. Supp. at 800.

The federal license for the Boston market, adopted shortly after passage of the Agricultural Adjustment Act in 1933, preserved rather than sought to destroy this geographic differential structure. Thus, the first Report of the Agricultural Adjustment Administration, covering the period May 1933 to February 1934, describes the methods of stabilizing and increasing producers' prices as follows:

> A uniform method of establishing minimum producers' prices in each market has been determined upon. This method takes into account three things:
>
> First, the competitive value of milk in relation to its value for uses other than as fluid milk at the outer edge of the milk shed. To this competitive value are added differentials for transportation, for quality, *and for convenience of location of the farm.* The prices of competing manufactured products adjacent to

> the milk shed are both those over a recent period and the anticipated prices in the near future.
>
> Second, the history of prices during the predepression decade in the milk shed under consideration. This includes full consideration of price differentials of class 1 or fluid milk over butter prices, changes in hauling costs and any changes made in the market standards and requirements.
>
> Third, the earning power index of the locality. Pay rolls serve as a good index for this purpose in many cities. [USDA: Agricultural Adjustment: *A Report of Administration of the Agricultural Adjustment Act, May 1933 to February 1934* (GPO 1934) p. 171 (emphasis added).

Although market pooling—in which blended prices are computed and paid on the basis of the use of milk in a market as a whole—was extensively used to eliminate violent price fluctuations, this appears to have resulted in the payment of equal prices to all producers only where no well-defined means of apportioning the market among various classes of producers existed. USDA: *Agricultural Adjustment in 1934, A Report of Administration of the Agricultural Adjustment Act* (GPO 1935), pp. 121, 123. Where such means did exist, producers would be assigned "bases" reflecting their economic position in the market. In such markets,

> producers receive[d] the class I price for delivered base milk, and a lower price for all milk they deliver in excess of their delivered bases. Under this arrangement *producers who are at the same distance from the market* and who

> produce milk of the same butterfat test, re-ceive[d] the same price for that proportion of their milk representing their share of the fluid milk and cream market, and the lower price for the excess portion of their milk that must be converted to manufactured uses. [*Id.* at 121-122; emphasis added.]

Thus, under the Boston license, producers who were located near Boston [10] were given bases of 85 percent of their average deliveries, but distant producers were given bases of only 61 percent of their average deliveries; the practical effect of this arrangement was to give the nearby producers a differential of about $.46 *in addition to* transportation differences. *Cranston, supra,* 290 F. Supp. at 800–801; A. 287, 294.

2. The 1935 amendments, which embodied the provisions here involved, simply carried forward the previous regulatory pattern under slightly modified forms, and the Secretary promptly continued the provision for a differential payable to dairy farmers near the Boston market

In 1935, the license provisions of Section 8(3) of the AAA were supplanted by the Order provisions of Section 8c(5) here involved. Those Order provisions, too, hewed closely to the practices which had developed prior to federal regulation and had been continued under the licenses. Indeed, the Committee Reports recommending passage of the 1935 amendments

[10] "Admittedly, under the language of the license the preferential base was granted to farmers who delivered their milk directly to [plants within 35 miles of the city]. But * * * only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence." *Cranston, supra,* 290 F. Supp. at 800.

state that the terms of Section 8c(5), dealing with milk marketing orders, "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present Section 8(3) * * *." H. Rep. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. 1011, 74th Cong., 1st Sess. (1935), p. 19.

Accordingly, the Act gave the Secretary continued authority to use the three techniques of market control which had been employed under the 1933 Act. The simplest of these, embodied in Section 8c(5)(A), enables him to classify milk according to use, to fix uniform, minimum prices for each use, and to require all handlers to pay those prices for the milk they buy."[11] No blended price is calculated in this case. The second technique, embodied in Section 8c(5)(B)(i), involves pooling by individual handlers; a single, uniform, blended price is calculated for each handler on the basis of the uses to which that particular handler puts the milk he buys. The third technique, embodied in Section 8c(5)(B)(ii) and the technique involved in this case, is that of marketwide pooling, corresponding to the market pools of the licenses. That is, producers are paid a single, uniform, blended price calculated on the basis of milk use in the market as a whole, so that it does not matter how the particular handler a producer sells to uses the milk he buys. Under each technique, the uniform price is

[11] The counterpart of § 8c(5)(A) in the licenses is explained in USDA: *Agricultural Adjustment in 1934*, *supra*, at pp. 120–121 (GPO 1935).

simply a starting point for the determination of how much the producer is to receive; it is subject to adjustments for volume, market, and production differentials customarily applied by handlers under the order, for the grade or quality of the milk delivered, and for the location at which delivery is made.

We discuss these three techniques in greater detail below, at pp. 42–48. We also show, at pp. 53–59, that the farm location differential comes within the statute's reference to market differentials customarily applied. In explaining the provision for market differentials, the Committee Reports describe a situation different from the farm location differential, and the court below took that description to be exclusive. 402 F. 2d at 673. That issue requires particular examination of the legislative history. For the present, it is sufficient to note that the overall impression given by the history of the Act as a whole is one of reiteration, not radical change. Its provisions, in general, readopt the institutions of the 1933 Act, and this was done with a specifically defensive purpose—to provide sufficient detail to avoid a holding in the courts that an unconstitutional delegation of power had been made, as had recently occurred in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495. Thus, the Committee Reports observe that the 1935 amendments "substitute the word 'order' for 'license' in order more accurately to describe the nature of the Secretary's regulatory power," H. Rep. No. 1241, p. 7, not to make sweeping changes in the scope of that power.

The Secretary promptly acted upon his understanding that, in the words of the Committee Reports, *supra,* p. 31, the new Act permitted him to "follow the methods employed by cooperative associations * * * and the provisions of licenses * * *," under which had been "added differentials for transportation, for quality, and for convenience of location of the farm." USDA: *Agricultural Adjustment* * * * May 1933 to February 1934, *supra,* p. 171. He authorized continued use of farm location differentials. The Boston Order, then known as Order No. 4 (A. 223–233, 248), was one of the first Orders he issued under the 1935 amendments. It provided, from the outset, for a differential payable only to a producer "whose farm is located within forty (40) miles of the State House in Boston" (A. 231).[12] The amount of the differential was in effect the same as had been payable under the Boston license—about $.46 in excess of the difference in transportation and handling costs between nearby and distant milk. The Secretary found that "the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for Class I use" (A. 224).

[12] The differential was also conditioned on delivery of the milk within the same area. It was in addition, however, to the $.21 differential paid to *all* producers for such delivery, *infra,* pp. 61–62; and it was unlikely that any nearby farmer able to sell in the city market would have delivered his milk anywhere else.

3. The Agricultural Marketing and Agreement Act of 1937 reenacted the prior regulatory scheme without material change, and specifically endorsed the Orders adopted under that scheme

The Secretary's reading of the Act gained Congressional approval shortly after the promulgation of the Boston Order. By 1937, the operation of the Agricultural Adjustment Act was again plagued with litigation. The processing tax embodied the Act had been declared unconstitutional in *United States* v. *Butler*, 297 U.S. 1, and several district courts, including the District Court for the District of Massachusetts,[13] then ruled that the processing tax provisions were not severable from the rest of the AAA, and that the whole Act was therefore invalid. The Boston Order was suspended, and the market thrown into chaos, until passage of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601, on June 3, 1937.[14]

Congress passed the 1937 Act to save the marketing order provisions of the AAA by reenactment. The Order provisions of Section 8c(5) were reenacted *verbatim*. This reenactment, and the congressional silence which has followed for thirty years, are in themselves sufficient indication that Congress approved the Secretary's interpretation of those provisions to authorize differential payments to nearby farmers. *E.g.*, *Morgan* v. *Commissioner*, 309 U.S. 78, 81; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 99; *Queensboro Farm*

[13] *United States* v. *David Buttrick Co.*, 15 F. Supp. 655, reversed, 91 F.2d 66 (C.A. 1), certiorari denied, 302 U.S. 737

[14] See *H. P. Hood & Sons, Inc.* v. *United States* 307 U.S. 588, 592.

Products v. *Wickard,* 137 F.2d 969, 977 (C.A. 2). At the time, Congress was aware that as a result of the doubt cast on the validity of the milk marketing orders, "producers of milk, *particularly in New England,* are now suffering from a seriously demoralized price situation." H.Rep. 468, 75th Cong., 1st Sess. (1937), p. 2 (emphasis supplied). Then and now, use of the differential has been a significant factor in milk marketing [15]; as recently as 1965, 40 percent of the milk marketed under federal regulation was marketed in milksheds subject to a farm location differential.[16] Congress amended Section 8c(5), without questioning the Secretary's use of the differential, in that year. P.L. 89–321, 79 Stat. 1187, 7 U.S.C. 608c(5).

Congress, however, did not leave the matter to implication. It provided in Section 4 of the 1937 Act, 7 U.S.C. 672(a) (emphasis supplied), that:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or act of the Secretary of Agriculture in connection with any such agreement,

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[15] See H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184; Hearings before Subcommittee on Dairy and Poultry, House Comm. on Agriculture, Dairymen's Class I Base Plan, 89th Cong., 1st Sess. (1965), p. 143.

[16] The four milksheds in which nearby differentials were employed—Massachusetts-Rhode Island, Connecticut, New York-New Jersey, and Chicago—accounted for 21.8 billion pounds of milk of a total of 54.4 billion subject to federal regulation in that year. USDA Statistical Bulletin No. 403, Federal Milk Order Market Statistics, Annual Summary for 1966 (1967), pp. 22–23.

> license, or order which has been executed, issued, approved or done under the Agricultural Adjustment Act, or any amendment thereof, but *such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized and confirmed.*

This section explicitly provided that the existing Orders and their provisions were lawful. One of those provisions was that of the Boston Order, Order No. 4, for a premium based upon farm location, designed to compensate nearby producers for the greater availability of their milk for Class I use (A. 224, 231), and in effect granting a differential in the same amount ($.46/hundredweight) to the same class of producers as the farm location differentials of all subsequent New England Orders (A. 285–287; *Cranston* v. *Freeman, supra,* 290 F. Supp. at 800–801).[17]

The court below erred in holding that Section 4 of the 1937 Act was designed merely to prevent "technical abatements" due to reenactment, 402 F. 2d at 670. The House Report recommending adoption of the Agricultural Marketing Agreement Act explained that:

> Section 4 of the bill negatives any implication that its effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section *also expressly ratifies, legalizes, and confirms such action.* Judicial sanction for such a provision is found in *Mattingly* v. *District of Columbia* ((1878), 97 U.S. 687, 690); *United States* v.

[17] We deal below, at pp. 59–63 with the mistaken contention of the court of appeals that there were significant differences between the post-1937 differentials and the earlier ones.

Heinzen ((1907), 206 U.S. 370, 382); *Tiaco* v. *Forbes* ((1913), 228 U.S. 549, 556); *Rafferty* v. *Smith, Bell & Co.* ((1921), 257 U.S. 226, 232); *Isbrandtsen-Moller Company, Inc.* v. *United States et al.* (No. 307, October Term, 1936, United States Supreme Court, decided Feb. 1, 1937); and *Swayne & Hoyt, Ltd., et al.* v. *United States* (No 494, October term, 1936, United States Supreme Court, decided Mar. 1, 1937). [H. Rep. No. 468, 75th Cong., 1st Sess. (1937), p. 4.] [Emphasis supplied.]

Thus, the section was designed to accomplish two objectives: (1) to avoid technical abatements and (2) "also" to ratify, legalize and confirm existing Orders. The decisions of this Court cited to support the latter purpose, all deal with congressional ratification or affirmation of prior Executive action, rather than measures taken only to avert technical abatements.

There was an important reason for explicitly affirming the prior administrative acts. In the preceding years, the Secretary's efforts at effective regulation of agricultural prices—particularly milk prices—had been thwarted by multiple litigation brought by handlers that attacked virtually every major feature of the licenses and orders.[18] For example, the 1936 Boston Milk Marketing Order had had to be suspended only six months after it was instituted, bringing chaos to that market. Representatives of Vermont farmers, in general not entitled to the farm location differential, pleaded with Congress to have the Order reinstated. See, *e.g.*, 81 Cong. Rec. 4964 (1937). No-

[18] See, *e.g.* the lists of cases involving milk marketing in *United States* v. *Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass.), and in USDA: *Agricultural Adjustment in 1934*, *supra*, pp. 253–260 (GPO 1935).

where is there evidence that they asked Congress to abolish the Secretary's established practice of paying a nearby differential, either in 1937 or subsequently. They, as well as Congress, knew that the Secretary's prior orders embodied the kind of provisions Congress intended him to employ, and wanted Congress to rescue them from a morass of litigation by making this clear through express congressional approval of his actions.

4. Milk Marketing Orders adopted upon passage of the 1937 Act included farm location differentials, which gained contemporaneous judicial approval

Following passage of the 1937 Act, the 1936 Boston Order was immediately reinstated; although the mechanics of the farm location differential were modified, that differential continued to provide an adjustment of about $.46 per hundredweight to farms located near the Boston market. Shortly thereafter, the Secretary adopted a Marketing Order for New York which embodied similar provisions. *United States* v. *Rock Royal Co-operative,* 307 U.S. 533, 567. Both Orders were immediately made the subject of litigation; the farm location, or nearby, differentials were among the provisions attacked.

The challenge to the farm location differential of the Boston Order was decided in the Court of Appeals for the First Circuit, *Green Valley Creamery, Inc.* v. *United States,* 108 F. 2d 342, 346. Writing for a unanimous court, Judge Magruder upheld that provision in the following words:

> Appellants further challenge the validity of certain differentials provided for in Article

VIII, Section 4, paragraphs 3 and 4, of the Order. The section is set forth in the footnote. It is argued that differentials based upon the location of the farms of producers are not authorized by Section 8c(5)(B)(ii)(c) of the Act, which authorizes only differentials based upon "the locations at which delivery of such milk is made." There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by

handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

Here again it may be observed that similar differentials were contained in the original Order No. 4, effective February 9, 1936, under an administrative interpretation of provisions of the Agricultural Adjustment Act of 1933, as amended (49 Stat. 750), which were re-enacted without change in the Agricultural Marketing Act of 1937.[19]

The challenge to the "nearby differential" of the New York Order was decided in this Court. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 567. Rock Royal Co-operative made the same contention respondents and the court below make today: "* * * [T]he payments are neither contemplated nor authorized by the Act. They are repugnant to 'equalization,' which the statute sought to accomplish. They were a basis of inequality" (Brief of Rock Royal Co-operative, Inc., Oct. Term, 1938, No. 771, p. 76).

[19] The court below attempted to distinguish the ruling in *Green Valley* as dictum, on the ground that the holding there was that the handlers lacked standing to raise the issue. 402 F. 2d at 671. However, the standing point in *Green Valley* more accurately was an alternative and clearly secondary ground of decision; the First Circuit's brief mention of the issue was prefaced with the word "Furthermore" (108 F. 2d at 346). Moreover, regardless how the First Circuit's approval of the differential is characterized, its view has reasonably been relied upon by the Secretary and thousands of New England farmers for 30 years, and clearly was entitled to great deference, if not *stare decisis* effect, by any court siting outside the affected area of New England.

The United States defended the differential on the same rationale of availability for fluid use that the court below found to violate the Act:

> * * * The 18 counties to which the nearby differentials apply are all very close to the marketing area and are separated from the rest of the milkshed by nonproductive mountainous territory * * *. The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential.* * * [Brief of the United States, No. 771, Oct. Term, 1938, pp. 60–61.]

This Court held: "The Act authorizes such an arrangement. § 8c(5)(A)." 307 U.S. at 567.

Since *Rock Royal* involved not producers but handlers, it involved Section 8c(5)(A) rather than 8c(5)(B) of the Act, and the court below sought to distinguish it on this ground. 402 F. 2d at 674, n. 40.1. The district court in *Cranston* v. *Freeman, supra,* 290 F. Supp. at 806, showed the error of that view:

> It is true that *Rock Royal* was a suit involving handlers and not producers and that Section 8c(5)(A) applies to the former rather than the latter. But Section 8c(5)(A) provides for the same uniform prices subject to the same adjustments as set out in identical language in Section 8c(5)(B) applying to producers. Therefore, the Supreme Court's holding that Section 8c(5)(A) "authorizes such

an arrangement" is most certainly authority that Section 8c(5)(B) authorizes the same arrangement.

Moreover, there was no difference in purpose between the *Rock Royal* "nearby differential" and the Boston farm location differential. Both sought to compensate farmers near the city for the economic advantages of their location, such as greater availability of their milk for fluid use—the purpose which the court below found to be forbidden by the Act.[20]

B. THE SCHEME OF THE ACT PERMITS USE OF A FARM LOCATION DIFFERENTIAL

1. Such a differential does not contravene the requirement that, in a marketwide pool, handlers pay prices which are uniform for the market, "irrespective of the uses made of such milk by the individual handler to whom it is delivered"

a. That requirement does not forbid consideration of patterns of use enjoyed by groups of producers in the market

In overturning the differential, the court below relied heavily on its view that the differential is inconsistent with the language of Section 8c(5)(B)(ii) of the Act, 7 U.S.C. 608c(5)(B)(ii), which states that in a marketwide pool, handlers are to pay producers a uniform price, "irrespective of the uses made of such milk by the individual handler to whom it is delivered." 402 F. 2d at 663; *Blair* v. *Freeman,* 370 F. 2d 229 (C.A.D.C.). There is no such inconsistency; the

[20] Nor can it be urged that the handlers in *Rock Royal* lacked standing to challenge the Secretary's authority to employ the differential. As the opinion of this Court makes clear, 307 U.S. at 567, part of the cost of the differential was "absorbed by the handlers" who paid it.

differential is fully compatible with the purposes of the Act.

No producer receives a higher price under the Massachusetts-Rhode Island Order because of the uses made of the milk by the particular handler with whom he deals. A nearby farmer who sells to a handler who makes only manufactured milk products will receive the same price as one who sells to a handler who deals in Class I uses only; both are entitled to the differential, and therefore receive more than a distant farmer, whatever use is made of the distant farmer's milk by his handler. Thus, the differential is paid only because of farm location, and irrespective of actual use. True, there is a departure from the general command of "uniform price"; but whether that departure is proper is governed, not by the "uniform price" language, but by the next sentence of the section, which provides that the uniform prices are subject to certain adjustments, including adjustments for "volume, market, and production differentials customarily applied by the handlers subject to such order * * *." It is circular to try to resolve the question whether the farm location differential is an authorized adjustment of the uniform price simply by referring to the provision for uniform price.

When the regulatory techniques of Section 8c(5) are viewed in their entirety, we believe it becomes even clearer that the differential does not offend the Act as a whole, or its "irrespective of the uses" language. As already noted, the section provides three different forms of regulation, each reflecting earlier

forms of self-regulation by dairy cooperatives and the techniques of the 1933 Agricultural Adjustment Act. The problem which they were all designed to meet was that of destructive competition among producers seeking to sell their milk at the highest price or to those handlers who used the most milk in fluid form—competition which together with an unmanageable surplus had driven down the price received by all producers. See *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 549–550. Section 8c(5) begins by providing that Milk Marketing Orders "shall contain *one or more* of the following terms and conditions * * *" (emphasis added). A close examination of each reveals the particular function of the marketwide pooling concept of Section 8c(5)(B)(ii) and its "irrespective of the uses" language.

The first term or set of terms authorized is contained in Section 8c(5)(A), 7 U.S.C. 608c(5)(A). It allows the Secretary to provide terms classifying milk in accordance with the form in which it is used (*e.g.*, Class I and Class II), to fix or provide a method for fixing minimum, "uniform" prices for each use classification, and to require all handlers to pay those prices, subject only to adjustments for "volume, market, and production differentials customarily applied * * *," for grade or quality, and for the locations at which delivery is made. Used alone, this would be a relatively simple form of regulation, adequate to meet the most brazen form of handler unfair practices, in which a handler forces neighboring farmers to bid each other down by offering them different prices for milk used the same

way (*e.g.*, as cheese). The Secretary could prevent such practices by making handlers pay the same price for all milk they use in the same way, subject to adjustments which he, not the handler, establishes.

But other competitive evils in milk marketing cannot be met by use of Section 8c(5)(A) alone, and in fact a pure Section 8c(5)(A) plan has never been used. If the handler can chose to whom to pay the uniform price for Class I milk and to whom to pay the lower uniform price for Class II milk, favoritism, abuses, and destructive competition remain possible—again with the possibility of driving down prices. The "handler pools" of Section 8c(5)(B)(i), 7 U.S.C. 608c(5)(B)(i), give the Secretary a means of dealing with this competitive evil. In handler pools, each handler must pay "uniform prices," calculated on the basis of his particular mix of the various uses of milk, for all milk he buys. These prices, too, are subject to the adjustments for volume, market and production differentials customarily applied, quality, and location of delivery; again, these adjustments are set by the Secretary in the Order, not by the handler.

Because the uniform price of handler pool milk varies from handler to handler, handler pools are inadequate to deal with another form of possibly destructive competition—competition among producers to sell to the handlers with the highest proportion of fluid milk usage. Such handlers would have the highest uniform prices under handler pool regulation. The marketwide pools of Section 8c(5)(B)(ii), 7 U.S.C. 608c(5)(B)(ii), enable the Secretary to deal with this

problem. Since the "uniform prices" in a marketwide pool are calculated on the basis of the mix of uses of milk in the market as a whole, subject to the same adjustments made by the Secretary, producers have no incentive to sell to any particular handler. They receive the same price "irrespective of the uses made of [their] milk by the individual handler to whom it is delivered."

These provisions are *not* on the whole designed to eradicate all differences in prices to farmers as the result of geographical differences. Farmers with limited access to the Class I market could not have sold much of their milk for that use under the Section 8c(5)(A) technique, and in fact might have been prevented from undercutting farmers near the markets through the setting of uniform prices by the Secretary. Nor would the situation have been much different under handler pools, since in the 1930's handlers buying milk at a substantial distance from the center of the market generally would manufacture much of that milk in the country (A. 320, 434); their uniform prices would therefore have been lower than those of handlers near the center.[21] And, in discussing the validity of the marketwide pool in *United States* v. *RockRoyal Co-operative, Inc., supra,* 307 U.S. at 571-573, this Court took comfort in the fact that instead of commanding an absolute and possibly unfair "equal-

[21] There were eight handler pools in effect in 1965, accounting for 3.96 billion pounds of milk, or over 7 percent of the total under federal regulation. USDA, Statistical Bulletin No. 403, n. 16, *supra*, pp. 12, 22–23.

ity", "the pooling has differentials to cover the variations of quality and location," *id.* at 573.

In sum, the marketwide pooling technique—

> * * * is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. [*United States* v. *Rock Royal Co-operative,* 307 U.S. at 572.]

As compared to the other techniques available, the marketwide pool permits the Secretary to deal with more sophisticated forms of price-cutting or price-disruptive competition. There is no evidence, however—and careful examination of the court of appeals' opinion will reveal that it suggests none—that Congress intended to force the Secretary, as a prerequisite to dealing with these competitive evils, radically to alter natural geographic price differences resulting from the greater accessibility of nearby milk, and clearly permissible under the other forms of regulation.[22] Each of the three plans calls for "uniform"

[22] For commodities other than milk, Congress decreed that Orders "shall be limited in their application to the smallest regional production areas or regional marketing areas * * * which the Secretary finds practicable." Section 8c(11)(B), 7 U.S.C. 608c(11)(B). A similar geographical restriction was not imposed upon milk marketing orders. The Committee Reports, however, state that the 1935 Amendments *in toto* were designed "[s]o that proper recognition may be given to local dif-

prices; there is no inherent inconsistency between that language and the fact that all nearby farmers may receive uniformly higher prices. The thrust of all the authorized plans was *stabilization* not disruption of long-standing economic relationships, and the "irrespective of the uses" language of the marketwide pool simply describes that pool's broader effect.

b. Even if traditional patterns of use may not be considered as such under the Act, the Secretary may adopt differentials which reflect the economic realities underlying those patterns

The existence of the the premium which is compensated by the farm location differential can be explained at two levels: first, as a product of the historical fact that nearby farmers were consistently able to sell a higher proportion of their milk at higher prices for Class I uses; second, as a product of economic advantages which determined that historical fact—evenness of production, proximity to the largest market for and to dealers specializing in fluid uses, reliability as a source of supply, and so on. Similarly, there are two possible readings of the Secretary's rationale for adopting the differential: first, that it is designed to compensate nearby producers for their

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ferences which may exist in production or marketing methods or conditions * * *." H. Rep. 1241, 74th Cong., 1st Sess. (1935), p. 9; S. Rep. 1011, 74th Cong., 1st Sess. (1935), p. 9. The manner in which Congress contemplated that such local differences would be handled in milk marketing orders is quite evident—by recourse to the adjustment provisions of Section 8c(5), which were to "follow the methods employed by cooperative associations * * * prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses * * *," *ibid.*, and which did take such differences into account.

larger share of the fluid market prior to marketwide pooling; second, that it is designed to compensate them for economic values or services they supply the market, such as accessibility as a source of supply. The two are not mutually exclusive; the various values nearby milk had, in the years just before federal regulation began, underlay the fact that at that time such milk was sold at a premium.

The court of appeals appeared to believe that both rationales were therefore improper; it did not remand the case to the Secretary once it concluded that the differential was based chiefly on the "condemned factor" of historical usage. (402 F. 2d at 665).[23] Rather, it indicated that the Act, in its view, did not authorize any differential based on farm location, and that even if there were sound economic bases for the differential, the Secretary was required to leave the matter of extra compensation to individual handlers.[24]

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[23] Of course, if the reason given by an agency for a regulatory provisions improper, but the provision might be justifiable on some other proper ground, the matter must be remanded to the agency. *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607; Cf. *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, 99.

[24] Although the Act makes plain as to each of the three regulatory techniques that it is the Secretary, not individual handlers, that is to set the authorized differentials, the court below expressed the view, 402 F. 2d at 672, as it had in *Blair*, 370 F. 2d at 238, that it must be left to the handlers to pay whatever premium is justified. To the extent this view is independent of the view that the nearby differential is unauthorized, it is clearly in error. Leaving it to individual handlers to pay such differentials as each feels warranted is an invitation to uneven treatment of farmers similarly situated, and thus possibly to the same sort of disruptions of the market that regula-

Even assuming that the "irrespective of the uses" language precludes the Secretary from relying on historical patterns of use, however, we can see no basis for the court of appeals' conclusion that underlying economic values cannot be compensated merely because of their *association* with those patterns. 402 F.2d at 664–666. In a statutory plan relying upon "[c]lassifying milk in accordance with the form in which * * * it is used", Section 8c(5)(A); derived from "the methods employed by cooperative associations * * * prior to enactment" of the Agricultural Adjustment Act "and the provisions of licenses * * *," H. Rep. No. 1241, *supra*, p. 9; and allowing for differentials "customarily applied," references to usage and history are proper. Indeed, most differentials payable under Federal Orders have some relationship to "sales advantage for fluid use"; for example, the butterfat differentials authorized by Section 8c(5)(B) as a quality differential are paid because a higher butter-

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tion is meant to prevent. It is true that in *Blair*, the Secretary stated that he was not basing his retention of the New York-New Jersey nearby differential upon the existence of extra values, which could be paid for by individual handlers. 22 Fed. Reg. 4194, 4213. But in promulgating the Order involved in the present case, he specifically linked the farm location differential with the "higher values * * * attached to milk produced near the principal consumption centers * * *" (29 Fed. Reg. 11213). If he is authorized to promulgate a differential which preserves those higher values, the fact that he might leave it up to the handlers, as he was willing to do in New York-New Jersey, is immaterial. And, of course, there may well be reasons for the differential which individual handlers would not consider of discrete value to them—such as the promotion of orderly marketing conditions.

fat content makes milk more attractive for fluid usage. See 16 Fed. Reg. 9255 (1951). Similarly, the "county station" differential paid for direct delivery to city plants is paid for convenience to Class I usage; manufacturing of milk is mostly done upcountry. See 32 Fed. Reg. 9905 (1967).

Finally, the court erred in concluding that the Secretary had based his adoption of the differential chiefly on the historical fact of usage patterns rather than on the economic considerations underlying those patterns. In promulgating the 1936 order he stated (A. 224):

> the payment of Class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability for Class I use. * * *

Although the court of appeals found itself "unable to distinguish" between this reliance on "availability for Class I use" and the "consideration of historical fluid use patterns" which it believed to be condemned, 402 F. 2d at 665, a reasonable distinction can be drawn. Cf. *Udall* v. *Tallman, supra,* 380 U.S. 1, 16–18. "*Availability* for Class I use" more readily refers to the economic reasons for those patterns than to their simple existence. That the "economic reasons" reading is the correct one is strongly suggested by the fact that when the Order was reissued in 1937, just a year later, the changes then made in the form of the farm location differential were said to be justified "in view of the changes in economic conditions since the

date of the original findings * * *" (2 Fed. Reg. 1331).[25]

There are additional factors which point to the same conclusion. Thus, in *Green Valley Creamery,* the court noted that it was not simply a matter of which farmers sold the most milk in fluid form; nearby producers could command "somewhat more favorable prices *for their fluid milk.*" 108 F. 2d at 346 (emphasis added) It is true that some decisions promulgating secondary orders not directly involved here, notably the Southeastern New England Order, 23 Fed. Reg. 8225, 8238 (1958), refer to the effect of the differential in preserving the *status quo, i.e.,* the existing shares of Class I use. Even there, however, the Secretary referred to value considerations, finding that adoption of a farm location differential "will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization." *Ibid.* This reasoning surely is *not* just one of historical use patterns. The 1964 opinion of the Secretary under review speaks in terms of the "customarily higher values" of nearby milk (29 Fed. Reg. 11213). The court of appeals, again proceeding on its erroneous reading of the Act and drawing the inference least favorable to the Secretary, surmised that this state-

[25] The Secretary has not simply assumed that because the differentials were once approved, they remain economically valid. The question whether they should be continued or extended has been the subject of repeated administrative inquiry. See, *e.g.,* 14 Fed. Reg. 7089 and 7102 (1949); 16 Fed. Reg. 9255 (1951); 22 Fed. Reg. 4213 (1957); 23 Fed. Reg. 8238 (1958); 24 Fed. Reg. 1063 (1959); 29 Fed. Reg. 11213–11214 (1964); 32 Fed. Reg. 9919 (1967).

ment "may be only a less direct way" of referring to the nearby producers' past greater share of the fluid market, instead of other values. Read as whole, however, the 1964 decision tends to point in a different direction.

Thus, the Secretary rejected a proposal to increase the differential when he found that the proponents of the increase were relying on the loss of other differentials and had not shown an increase in inherent value of the nearby milk (29 Fed. Reg. 11214). Similarly, he made clear that he was amenable to giving further consideration to the matter upon a solid "study of the economic and legal aspects" of the differentials (*ibid.*). And his most recent consideration of the differential, which he again found to be required for effective market regulation, plainly reflects such study, not simple reliance on historical patterns. 32 Fed. Reg. 9918–9920 (1967).

2. *As the First Circuit held in* Green Valley Creamery, *the farm location differential is a "market differential" authorized by the Act*

Among the adjustments which the Secretary is permitted to make to price under all three of the regulatory schemes embodied in Section 8c(5)(B) is an adjustment for "volume, market, and production differentials customarily applied by the handlers * * *." For thirty years, the Secretary has understood the phrase "market differentials" to refer to any price differential handlers customarily applied in the market. The farm location differentials of the various Boston and New England Milk Marketing Orders drew

their authority from that phase.[26] *Green Valley Creamery, Inc.* v. *United States, supra; Cranston* v. *Freeman, supra.* The court below, however, decided (402 F. 2d at 672–673) that the phrase "market * * * differentials" encompassed only a single kind of differential, different from the farm location differential.

The court based its view on discussion appearing in the Committee Reports in which the Committees ostensibly described each of the three types of differentials referred to in the "customarily applied" phrase. The Reports describe the market differential as—

> a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because

[26] *Blair* v. *Freeman*, 370 F. 2d 229, involved the nearby differential of the New York-New Jersey Milk Marketing Order. The Secretary's opinion adopting that differential relied solely and specifically on a different source of authority—the Secretary's authority under Section 8c(5)(B) to adopt differentials reflecting "(c) the locations at which delivery of such milk [was] made." The only *holding* in *Blair* was that since not all milk is delivered to handlers at the producers' farms, farms are not "locations at which delivery * * * was made," and the nearby differential could not be supported under that provision. *Blair* is thus technically distinguishable from the present case: "market * * * differentials" were not there involved. There were, of course, extensive *dicta* regarding the meaning of "market differential" and of the "irrespective of the uses" language of Section 8c(5)(B)(ii), and the court's reliance on those *dicta* below requires that we demonstrate their error.

> of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. [H. Rep. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rep. No. 1011, 74th Cong., 1st Sess., p. 10.]

If this is an exclusive definition, the farm location differential could not qualify as a "market differential," since it does not compensate for delivery and since it was developed in Boston, the primary market. But the reference to "market differential" has never been read so narrowly, and should not be so read today.

First, the legislative history of the 1935 amendments, viewed as a whole, shows a strong contrary current of endorsing all prior regulatory practices, suggesting that "the narrow definition of market differentials contained in the Committee reports must be read as illustrative rather than as restrictive." *Cranston, supra,* 290 F. Supp. at 800. Since the principal pricing features of the 1935 amendments closely follow the licenses, it is reasonable to infer that the differential provisions, too, were designed to follow the licenses and to authorize the Secretary to adopt in milk marketing orders at least the more usual differentials that existed before 1935. The farm location differential was a prominent one, which in the 1930's represented as much as 20 percent of the total price nearby farmers received for their milk (A. 426).[27]

[27] Nearby differentials were of enough importance to warrant mention in the initial report of the Agricultural Adjustment Administration, quoted above, as well as in a Federal Trade Commission Report on Distribution and Sale of Milk and Milk

Had anyone then thought that the 1935 amendments would require its elimination, there would surely be a great deal of legislative history directly in point. But so far as we can determine, there is only one bit of legislative history dealing directly with nearby differentials. That is a colloquy between Senator Murphy, the Floor Manager of the bill, and Senator Copeland of New York, 79 Cong. Rec. 11139-11140 (1935), which clearly evidences an understanding that differentials based on farm location were permissible as "volume, market and production differentials customarily applied * * *" if it was "the present practice of business" (79 Cong. Rec. 11140) to pay them. Significantly, this colloquy took place after the issuance of the Committee Reports. Cf. *Chicago, M., St. P. & P. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 470–475.

We showed above, *supra*, pp. 30–32, that in general the 1935 amendments were adopted not to introduce a radically new pricing scheme for milk—as would have occurred had the nearby differentials been forbidden—but to reinstate the prior regulatory scheme in a manner that would avoid *Schechter* delegation problems. In this light, the new reference to "volume, market and production differentials customarily applied" appears to give the Secretary a valuable tool with which to meet a *Schechter* contention: on the

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Products, H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184. Since prices have risen while the amount of the differential has remained constant, the differential now represents only about 8 percent of the blend price in New England markets (A. 360–361, 463).

one hand, the language is broad enough to permit continued exercise of the discretion the Secretary had under the license provision; on the other, the requirement of customary application makes clear that his discretion was not unbounded, and provides a relatively fixed standard for its exercise—the past practices of cooperatives and under the licenses. The Secretary is unlikely to have viewed *Schechter* and other like decisions as mandating or encouraging him to regulate *more* extensively against the [illegible] of the free market than he had already undertaken to do, and in fact he did not do so. Yet the ruling below would have Congress requiring him radically to alter the relationships of groups of producers in the market by imposing an equality of price which had never previously existed in the cooperative or licensing programs.

All intervening readings of the amendments have ignored the Committee Reports' definition, giving "market differential" its natural, broad meaning. Thus, the Secretary has viewed Section 8c(5)(B) as authorizing "adjustments with respect to quality, location or other differentials customarily practiced in the market"; see U.S.D.A.: *Agricultural Adjustment 1933 to 1935: A Report of Administration of the Agricultural Adjustment Act, May 12, 1933, to December 21, 1935* (GPO 1936), p. 269, and, of course, as permitting farm location differentials. *Supra,* p. 28. In *United States* v. *Rock Royal Co-operative, Inc.,* 307 U.S. 533, 571, this Court described Section 8c(5) as allowing "differentials for quality, location or other

usual market variations * * *." And see *Queensboro Farms Prods.* v. *Wickard,* 137 F. 2d 969, 977 (C.A. 2). *Green Valley Creamery, supra,* not only sustained the farm location differential as a market differential, but also upheld a separate provision for differential payments to associations of producers for marketing services they performed as a market differential. Judge Magruder stated that "The phrase 'market differential,' undefined as it is in the Act, is reasonably susceptible of such an interpretation." 108 F. 2d at 345. In *Brannan* v. *Stark,* 342 U.S. 451, 466, this court endorsed that holding of *Green Valley*:

> Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and noncooperative milk was upheld in *Green Valley Creamery* v. *United States,* as a "market differential" authorized by § 8c(5)(A)(1).

Finally, as a factual matter, the example given in the Reports is particularly inapt. The differential apparently there described, often known as the "country station" differential, reflects savings in handling costs resulting from delivering milk directly to a city instead of through a country plant.[28] But country station differentials, despite the description in the Committee Reports, are not usually paid in secondary mar-

[28] Compensation for direct delivery is now one component of the "zone differential" of the Massachusetts-Rhode Island Order, 7 C.F.R. 1001.62, which deals with savings in both transportation and handling costs.

kets. *Cranston, supra,* 290 F. Supp. at 798. And, again despite that description, country station differentials are readily contained in the reference to adjustments for "the locations at which delivery * * * is made"; consequently, if only such differentials qualify as "market differentials," the reference to market differentials is redundant.[29] In any event, the whole question was mooted two years later, in 1937, when the Congress by reenactment specifically ratified what the Secretary had done—which included recognition of a farm location differential on the basis of its customary use in the market. See *Red Lion Broadcasting Co., supra,* No. 2, Oct. Term 1968, decided June 9, 1969, sl. op., p. 13.

3. The farm location differential now employed in the Massachusetts-Rhode Island Order is essentially the same as the one Congress ratified

The court below appears to doubt whether farm location differentials—or at least this differential—were differentials "customarily applied by the handlers" in the market. In promulgating the Order under attack, the Secretary found that "Such farm location differentials have been in effect under the several New England orders since the inception of the Orders", that they reflect "historical price relationships by location which prevailed in these markets", and that there

[29] The Court below stated that the adjustment for "the locations at which delivery of such milk is made," Section 8c(5), "plainly * * * was designed to recognize differences in transportation costs only * * *," 402 F. 2d at 672. But had Congress desired so to restrict the provision, it would have been simple to provide for an adjustment "for differences in transportation costs."

were "customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed." 29 Fed. Reg. 11213 (1964). On the basis of the history set out at length above, *supra* pp. 8–13, the other courts which considered the question have agreed that "similar differentials in favor of nearby farms had existed in the Boston market for many years," *Green Valley Creamery, supra,* 108 F. 2d at 346; *Cranston, supra,* 290 F. Supp. at 800; these practices were embodied in the Boston license under the Agricultural Adjustment Act of 1933 and the first Boston Milk Marketing Order, Order No. 4, under the 1935 amendments. *Id.* at 800–801. Thus, little basis for dispute appears.

The court's doubts appear to rest on two mistaken notions regarding the pre-1937 differentials: first, that they were "never * * * payable over and above the transportation differential available to distant producers who delivered to a nearby zone," 402 F. 2d at 670; second, that the present differential is of a markedly different kind than any that ever appeared in a greater Boston license or order before 1937, *ibid.* Its doubts—in themselves a remarkable basis for invalidating a 30-year practice on summary judgment—are unsupported by the record.[30]

[30] Another example of the court's treatment of the record is its statement (402 F. 2d 660, 672–673, n. 36) that "[it] is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the

First, it is clear that nearby differentials have been separate from and payable in addition to transportation differentials at all times. *Supra,* pp. 27–28, H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184; *Cranston, supra,* at 800–801; 32 Fed. Reg. 9919. Indeed, the Secretary specifically stated in promulgating the Order under review that the farm location differential was adopted to provide nearby farmers with the "customarily somewhat higher values, *above those which normally reflected transportation costs,*" that they received in the market. (29 Fed. Reg. 11213; A. 320, 350, 528, 534.)

The court's error is clearly shown by its discussion of the function and relationship of the various differentials embodied in Order No. 4, the 1936 Boston Order. The court believed (402 F. 2d at 664) that distant producers who delivered to a plant within 40 miles of the city under that Order would receive a $.21 country station differential, *and* that this differential was not paid to nearby producers. But in fact, the nearby producer who delivered to nearby plants received a combination payment, which included both the $.21 country station differential and the approximately $.46 farm location differential nearby farmers had customarily received in the free market and under the licenses (Art. VIII, A. 231). In February of 1936, the distant farmer who delivered to a plant within 40 miles

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nearby differential be based solely on farm location." But bulk tanks did not exist in the 1930's, 23 Fed. Reg. 8227, and it was not until 1962 that over 50 percent of the farmers in the Boston Market shipped in bulk.

of Boston received a total price of $2,859/hundredweight; the nearby farmer who delivered to the same plant received $3.30/hundredweight. H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 183–184. The difference, $.441, is attributable to only one consideration, farm location;[31] its equivalence to the earlier and later differentials of the same magnitude, also attributable only to farm location, is apparent.

The court's concern that the 1937 Order's farm location differential was in a different form than the differentials embodied in the earlier licenses and Orders raises no matter of substance. In effect, all the Secretary did in 1937 was to separate the country station differential of $.21, applying to *all* producers who delivered directly under the 1936 Order, from the (then) $.44 farm location differential, which was available only to nearby producers. 2 Fed. Reg. 1331, 1333. Thus, what had always been two separate differentials in fact were simply recognized as such in the 1937 order. Such a purely formal change—made within a month of the 1937 Act's passage—lends no support to the court's conclusion that the farm location

[31] This amount was also in addition to transportation differences. If a distant farmer delivered to a plant close to the city, he paid the cost of transporting the milk out of his pocket, and there would be no formal "transportation differential." But if he delivered to a country plant, he bore the expense of getting the milk to that plant, and his blend price was further reduced by a transportation charge, or differential, based on the distance from the country sttaion to Boston. See H. Doc. 501, *supra*, pp. 183–184.

differential was not one "customarily applied by the handlers" in the market.[32]

Again, the earlier provisions embodied a preferential basing system, described above; but the economic realities of the situation remained the same. Under the licenses, the 1936 Order, the 1937 Order, and all succeeding orders including the present one, there has always been a differential of approximately $.46[33] payable only to nearby producers, and for the same purpose—to compensate them for the economic advantages of proximity to the market.

C. THE FARM LOCATION DIFFERENTIAL DOES NOT "PROHIBIT" THE FLOW OF MILK FROM OTHER AREAS OF THE COUNTRY, IN VIOLATION OF SECTION 8C(5)(G)

The court below did not consider respondents' contention that the differential "prohibits" the flow of milk from other areas of the country, in violation of Section 8c(5)(G) of the Act, 7 U.S.C. 608c(5)(G). The contention is without merit.[34]

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[32] In any event, if the present farm location differential is deficient only in form, the appropriate course for the court of appeals would have been to remand the matter to the Secretary to give him an opportunity to consider whether to revert, for example, to the terms of the 1936 Order.

[33] The maximum price a producer could receive has always been limited, in theory, by the Class I price. However, because at least 40 percent of the milk in the Boston market is surplus, or Class II milk, the blended pool price does not come within $.46 of the Class I price. Accordingly, at all relevant times the differential has had the approximate value referred to in the text.

[34] Further, respondents lack standing to attack the differential on this ground. Producers, although not regulated under the Agricultural Marketing Agreement Act of 1937, see 7 U.S.C. 608c(13)(B), may challenge provisions of Milk Marketing

In order for a provision of a milk marketing order regulating milk to constitute a trade barrier forbidden by Section 8c(5)(G), it must either directly or as a matter of practical economic effect "prohibit" the marketing in that area of milk produced in some other area.[35] *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76. The farm location differential is not a direct bar to the introduction of milk into the Massachusetts-Rhode Island area; respondents contend that it is an "economic" trade barrier within the meaning of *Lehigh Valley*. Since the amounts payable under the differential are taken

Orders in some circumstances. *Stark* v. *Wickard*, 321 U.S. 288. But they may not challenge a provision simply because it results in a lower minimum price to them. *Benson* v. *Schofield*, 236 F. 2d 719 (C.A.D.C.), certiorari denied, 352 U.S. 976; *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527, 529 (C.A.D.C.); *Calhoun* v. *Freeman*, 316 F. 2d 386 (C.A.D.C.); *Velman* v. *Freeman*, 267 F. Supp. 842, 844–846 (E.D. Wis.), affirmed, 388 F. 2d 308 (C.A. 7), certiorari denied 390 U.S. 1026. While they have standing under *Stark* to contend that the differential is not authorized by Section 8c(5)(B) and thus results in an improper "diversion" from the pool, *Blair* v. *Freeman*, *supra*, they would not have standing to challenge the differential as being illegal on grounds unrelated to allocation of pool funds, such as the "trade barrier" contention, under those cases. Moreover, Section 8c(5)(G) deals with barriers to handlers, not producers. If the differential really had the tendency of keeping additional milk from coming into the Massachusetts-Rhode Island market, as respondents seem to urge, that presumably would redound to their benefit.

[35] Section 8c(5)(G), 7 U.S.C. 608c(5)(G), provides:

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

from the pool before calculation of the uniform blend price, its immediate apparent effect[36] is to reduce that uniform price, which (subject to other adjustments) is the price payable to distant farmers under the Order. Respondents claim that the fact that such a reduction occurs tends to make the marketing of milk under the Order less attractive to the distant producer, and therefore constitutes a "trade barrier" to the marketing of their milk.

The flaws in this argument are many. First, there is no evidence that the farm location differential in fact has effectively limited—much less prohibited—the marketing in the Massachusetts-Rhode Island area of milk produced in other areas of the United States. Such a showing is necessary. Cf. *United States* v. *Lewes Dairy, Inc.*, 337 F. 2d 827 (C.A. 3), certiorari denied, 379 U.S. 1000; *Lewes Dairy, Inc.* v. *Freeman*, 401 F. 2d 308 (C.A. 3), certiorari denied, 394 U.S. 929. The facts show, instead, that the differential has not at all inhibited the free flow of milk across State lines. As the Brief *amicus curiae* of the Attorney General of Vermont in opposition to the petition in No. 25 pointed out (p. 3), "In 1968, Vermont producers supplied 1,649,300,000 pounds of milk" to the Massachusetts-Rhode Island market. Indeed, more milk is delivered from Vermont to the market than from any other State, including Massachusetts (A. 81). About three-fourths of the milk in this market is received from non-nearby sources (A. 615–618);

[36] It is disputable whether, over the long run, the differential does substantially lower the blend price. See pp. 67–68, *infra*.

as of 1962, more than 90 percent of the milk in the Boston market, which has had such differentials since the 1920's, came from such producers (A. 615).

The evidence further shows that farm location differentials have not tended to spur production in nearby areas or depress production in distant areas (A. 490), closely approximate the situation obtained in free markets and handler pools, and "will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization," 23 Fed. Reg. 8238 (1958). Such a measure is not a "barrier" to the marketing of milk produced in outside areas.[37]

Moreover, Section 8c(5)(G) was not designed to preclude the Secretary from taking "local differences which may exist in production or marketing methods or conditions" S. Rep. 1011, *supra*, p. 9, into account; otherwise, the pricing provisions of Section 8c(5)(B), including the adjustment provisions, would be meaningless. See remarks of Rep. Marvin Jones, H. Conf. Rep. No. 1757, 74th Cong., 1st Sess. (1935), p. 21:

> * * * The language adopted by the conference agreement does not refer to milk, and so does not negate the applicability to milk, for use

[37] The farm location differential does not discourage *handlers* from bringing distant milk into the Massachusetts-Rhode Island Order. It is accordingly distinguishable from the provisions involved in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, *supra*, and in *Polar Co.* v. *Andrews*, 375 U.S. 361. In *Lehigh Valley* this Court implied that a marketing order which included a rate of compensatory payments merely placing non-pool (unregulated) handlers on a par with pool (regulated) handlers would not be a trade barrier. 370 U.S. at 98, and 87 n. 13.

> in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc.

See also *Cranston* v. *Freeman, supra,* 290 F. Supp. at 804–805. Congress must have recognized that every time the Secretary established prices pursuant to Section 8c(5), or established a transportation differential, or nearby differential, or other differential, there might be some effect on the flow of milk. The mere fact that the otherwise authorized pricing plan may result in a lower minimum price payable to a producer than he believes that he ought to receive does not create an illegal "trade barrier" under Section 8c(5)(G).

A stated policy reason for the pricing provisions, 7 U.S.C. 602, is to ensure an orderly flow of milk to and within the market.

The Secretary honored that policy when he refused to increase the farm location differential in 1964 while reducing transportation differentials which also served to increase the nearby farmers' share of the pool. He noted that the reduction was required to redress a relative imbalance in values which had led to excessive cross-transportation of milk—distant milk to the city for fluid use, and nearby milk to country manufacturing plants. 29 Fed. Reg. 11207. Complete elimination of the differential, on the other hand, could disrupt the orderly flow of milk. As noted *infra,* p. 71, the consequent lowering of price to nearby farmers might put them out of business, depriving the cities of ready sources of supply. The short run

rise in the blend price received at the distant parts of the milkshed might simply attract more surplus milk from other, neighboring milksheds until it again dropped into parity with the prices available in those milksheds. (A. 554–556; cf. 7 C.F.R. 1001.60.) In the long run, the price would remain higher than it presently is at the edge of the milkshed only if so many nearby farmers were forced out of the market that permanent new sources of supply were required; the result would be diversion of those sources from their previous markets and a net rise in the prices consumers pay. Such an effect in itself disserves the orderly flow of milk to the market.[38]

Finally, as discussed earlier, *supra,* pp. 34–38, Congress has ratified, legalized and confirmed this differential, thereby foreclosing any Section 8c(5)(G) attack upon the Secretary's statutory authority to use it. Moreover, the history of the provision, showing that ever since the inception of Federal regulation, Congress, the Secretary and the courts have always considered such differentials to be authorized, also strongly indicates that they do not raise forbidden "trade barriers."

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[38] Respondents' real complaint seems to be that the farm location differential is unconstitutionally discriminatory against them. But a differential which in effect partly retains an advantage which one group held prior to regulation is a rational method of regulation and not an unconstitutional discrimination. *Secretary of Agriculture* v. *Central Roig Refining Co.* 338 U.S. 604, 616–618: *Texas American Asphalt Corp.* v. *Walker,* 177 F. Supp. 315, 326–327 (S.D. Tex.)

II. THE SECRETARY HAD A SUBSTANTIAL BASIS FOR INCLUDING A FARM LOCATION DIFFERENTIAL IN THE MASSACHUSETTS-RHODE ISLAND ORDER

Since the court of appeals viewed the inclusion of a differential based upon farm location as being beyond the Secretary's statutory authority, it did not reach the question whether he had a substantial basis for including it in the 1964 Order. Ordinarily, of course, this question would be one appropriate for the court of appeals in the first instance. However, since this Court granted the petition for a writ of certiorari in *Zuber* v. *Allen*, No. 25, without limitation and that question was there presented, we discuss it briefly here.

The 1964 Order was the product of extensive hearings on numerous issues concerning the various New England Milk Marketing Orders then extant. In that Order, the Secretary continued the previous differential for farm location in effect, rejecting suggestions both that it be increased and that it be decreased. 29 Fed. Reg. 11213–11214. He had an ample basis for that action.

Differential pricing structures not only were customarily applied in New England markets prior to regulation, but also continue to exist in free markets and handler pools. Thus, an economist testifying at the hearings preceding issuance of the 1964 Order pointed out that in California "producers located nearby Los Angeles distributing plants are able to obtain more favorable contracts, and thus a higher Class I utilization, than producers that are located

in the central valley or any other place" (A. 549). The Los Angeles market is unregulated. Similarly, in Philadelphia (Delaware Valley), where a handler pool was in use in 1964, nearby producers were able to obtain a premium of about 45¢ over other producers selling in the market (A. 528). Similar results were observed in southeastern New England in the late 1950's, before that area came under federal regulation (A. 527).

The Secretary also noted that the long practice of paying such differentials under federal milk marketing orders in New England has not resulted "in unstable or disruptive marketing conditions" (29 Fed. Reg. 11213), such as undue stimulation of production in nearby areas or depression in distant areas (A. 490); such disruption could be expected if the differential were at war with the economics of the marketplace. There was testimony (A. 52) that, especially in New England, the

> location advantages of nearby supplies include greater availability at any time when transportation may be interfered with seriously. The nearby milk also is more available for quality supervision, particularly by small processors.

Though the accessibility of distant milk has increased due to improved transportation and the phenomenon of bulk tanks,[39] still

> * * * nearby milk does have a value on account of its accessibility to the market * * * [W]e have had many cases in Massachusetts, Worces-

[39] See n. 30, *supra*.

> ter, particularly, of something that has happened in the plant, either through accident or bad milk or spillage, that the handler has had to send out his trucks and pick up milk on a second pick up on the farm in order to have milk to use that day which would be impossible if he had to go to distant farms for it. [A. 564.]

There was also evidence before the Secretary that the abolition of the differential could force many nearby farmers out of the dairy business (A. 491, 515, 563), thus diminishing natural, long-standing, and reliable sources of supply for city markets,[40] and that the market structure now reflected investment decisions based on the assumption that the differential would continue (A. 466–467). In the 1930's for example, the existence of the differential led some nearby farmers to forego a course they might otherwise have taken, of becoming producer-handlers not regulated under the order. See A. 270. Moreover, elimination of the differential now could imperil small handlers, who necessarily rely upon nearby sources, and thus speed the undesirable trend toward handler concentration (A. 490–492).

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[40] One student of agricultural economics, a nearby dairy farmers, remarked that (A. 494):

"No economist in his right mind would advocate such a drastic drop in price for any group of milk producers. No administrator could justify such treatment. There would be no economic gain to any consumer. In fact, just the opposite would be true, because larger amounts of milk would have to be transported longer distances to meet the Class I demands of consumers in Southern New England.

"In the words of Mr. Beal, it is uneconomic to transport a product which 'contains about 88 per cent water.' Soon the diseconomy would result in an increase in the Class I price or a greater cost of milk to the consumer."

In sum, there is substantial evidence that the differential is consonant with the declared policies of the Act, 7 U.S.C. 602, to establish and maintain orderly marketing conditions and an orderly flow of commodities to the market for the benefit of both producers and consumers, and to return parity prices to farmers. Such differentials have been an integral part of milk marketing orders for more than 30 years; during that time, those orders have tended successfully to advance those statutory objectives. The Secretary found, accordingly, that the farm location differential, together with the remainder of the Order provisions, "will tend to effectuate the declared policy of the Act." 29 Fed. Reg. 12236, 12237.

Of course, there has been a long-continuing debate concerning such differentials.[41] But, as shown above, there was ample basis for the Secretary's determination that the differential should be continued in effect. "Such an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here." *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 567–568.

[41] For example, in 1962, a Federal Milk Order Study Committee, known as the "Nourse Committee," recommended in a report adopted by a 9–8 vote of its members, *inter alia*, that the Secretary give further consideration to whether such differentials should be reduced or eliminated. Federal Milk Order Study Committee Report to the Secretary of Agriculture (1962).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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